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No. 09-253

In the

Supreme Court of the United States

HECTOR ADAMES, JR. and ROSALIA DIAZ, as Co-Special Administrators of the Estate of JOSHUA ADAMES, Deceased,

Petitioners,

v.

BERETTA U.S.A. CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE AND BRIEF OF CHILDREN'S DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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SEPTEMBER 2009

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Pursuant to Rule 37.3(b) of the Rules of the Supreme Court of the United States, Children's Defense Fund ("CDF") hereby requests leave to file the accompanying *amicus curiae* brief. This brief is submitted in support of the petition for writ of certiorari to the Supreme Court of Illinois. Counsel of record for all parties received notice of CDF's intention to file this brief on September 16, 2009, pursuant to Rule 37.3(a) of the Rules of the Supreme Court of the United States. Petitioners Hector Adames, Jr. and Rosalia Diaz have consented to the filing of this brief. Respondent Beretta USA Corporation has not consented.

As set forth in the accompanying brief, Children's Defense Fund is a non-profit advocacy organization devoted to improving the lives of all children in America. CDF is especially concerned about the harmful effects on children of gun violence. Since 1999, CDF has monitored gun violence against children, publishing its findings annually in its *Protect Children, Not Guns* report. CDF is concerned that the Supreme Court of Illinois incorrectly construed the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7902 *et seq.*, to bar a design defect claim against a gun manufacturer arising out of the accidental killing of a child by another child.

Accordingly, Children's Defense Fund respectfully requests leave to file the accompanying amicus curiae brief.

Respectfully submitted,

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QUESTION PRESENTED

Amicus addresses only the question whether the Supreme Court of Illinois correctly construed the Protection of Lawful Commerce in Arms Act, which does not preempt actions "resulting directly from a defect in design" except in cases involving "a volitional act that constituted a criminal offense," 15 U.S.C. § 7903(5)(A)(v), to bar a design defect claim against a gun manufacturer arising out of the accidental killing of a child by another child.

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OTHER REFERENCES

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151 Cong. Rec. S9374 (daily ed. July 29, 2005) 15, 17

Anil Ananthaswamy, *The Way of the Gun*, New Scientist (July 12, 2003) 9

Children's Defense Fund, *Protect Children, Not Guns* (2009) 1, 7, 8

James Dao, *Under Legal Siege, Gun Maker Agrees to Accept Curbs*, N.Y. Times, Mar. 18, 2000 12

John S. Milne et al., *Effect of Current Federal Regulations on Handgun Safety Features*, 41 Annals Emergency Med. 1 (2003)..... 9

Jon S. Vernick et al., *Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines, and Motor Vehicles*, 97 Am. J. Pub. Health 1991 (2007) 11

Jon S. Vernick et al., *"I Didn't Know the Gun Was Loaded": An Examination of Two Safety Devices that Can Reduce the Risk of*

Unintentional Firearm Injuries, 20 J. Pub. Health Pol'y 427 (1999) 3, 9, 19

Jon S. Vernick et al., *Role of Litigation in Preventing Product-Related Injuries*, 25 Epidemiologic Rev. 90 (2003) 10, 11

Joseph L. Annest et al., *National Estimates of Nonfatal Firearm-Related Injuries: Beyond the Tip of the Iceberg*, 273 J. Am. Med. Assoc. 1749 (1995) 8

Preston Elrod and R. Scott Ryder, *Juvenile Justice: A Social, Historical, and Legal Perspective* (2005)... 22

Protection of Lawful Commerce in Arms Act Report, H.R. Rep. No. 109-124 (2005) 13-14

Rachana Bhowmik, *Aiming for Accountability: How City Lawsuits Can Help Reform an Irresponsible Gun Industry*, 11 J.L. & Pol'y 67 (2002) 12

Richard B. Ismach et al., *Unintended Shootings in a Large Metropolitan Area: An Incident-Based Analysis*, 41 Annals Emergency Med. 10 (2003) 8

Ryan VanGrack, *Recent Development: The Protection of Lawful Commerce in Arms Act*, 41 Harv. J. on Legis. 541 (2004) 12

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U.S. Gen. Accounting Office, GAO/PEMD-91-9, *Accidental Shootings: Many Death and Injuries Caused by Firearms Could be Prevented* (Mar. 1991) 8-9

INTEREST OF *AMICUS CURIAE*

The Children's Defense Fund ("CDF") is a non-profit child advocacy organization devoted to improving the lives of all children in America.[1] CDF champions policies and programs designed to lift children out of poverty, shield them from abuse and neglect, help them to gain access to health care and a quality education, and provide them a moral and spiritual foundation. Since 1999, CDF has monitored gun violence against children, publishing its findings annually in its *Protect Children, Not Guns* report. CDF has long recognized that firearm-related deaths and injuries to children and teens are a significant public health problem both in terms of their impact on children's physical and mental health and the cost to the public health system in the United States.

INTRODUCTION

Every day, almost nine children and teens die by gunfire. Children's Defense Fund, *Protect Children, Not Guns* 2 (2009) (hereinafter *Protect Children, Not Guns*). After a decade of decline, the number of firearm-related deaths and injuries among children

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[1] Counsel of record for all parties received notice of CDF's intention to file an amicus brief at least 10 days prior to the due date of the brief. As noted in the accompanying Motion for Leave to File Brief of Children's Defense Fund as *Amicus Curiae* in Support of Petitioners, Petitioners have consented to the filing of this brief. Respondent has not consented. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than CDF or its counsel made a monetary contribution to the preparation or submission of this brief.

and teens increased for the second year in a row. According to the most recent data from the Centers for Disease Control and Prevention, a total of 3,184 children and teens died from gunfire in the United States in 2006, a six percent increase over 2005. A total of 17,451 children and teens were victims of non-fatal firearm-related injuries in 2006, a seven percent increase over 2005. Many of these tragic deaths and injuries could have been avoided if the guns had been designed with simple gun safety mechanisms. Gun manufacturers like respondent Beretta U.S.A. Corporation ("Beretta") should not be allowed to escape liability for accidental injuries and deaths, including the death of Josh Adames, when they failed to incorporate a simple and inexpensive gun safety mechanism into their firearms.[2]

On May 5, 2001, 13-year-old Billy Swan accidentally shot and killed his friend, Josh Adames, with Billy's father's Beretta 92FS handgun.[3] Billy, while home alone, had invited Josh over to play. While waiting for Josh, Billy noticed that his parent's closet door was partially open. He found a lockbox on the top shelf, opened it, and found the Beretta 92FS, a semiautomatic nine-millimeter pistol. Billy had never handled a gun before.

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[2] CDF supports granting certiorari on the third issue raised in the Petition – whether the Illinois Supreme Court correctly interpreted the Protection of Lawful Commerce in Arms Act to preempt petitioners' design defect claim. CDF's brief does not address the two constitutional issues presented by petitioners.

[3] These facts are drawn from the Illinois Supreme Court's opinion. Pet. App. 2a-5a.

Billy took the Beretta 92FS downstairs, along with two other guns that he had found in the closet. After Josh arrived, Billy, Josh, and another friend started to play with the guns. While the boys were playing, Billy removed the Beretta 92FS's magazine, into which the gun's ammunition had been loaded. Billy assumed – not unreasonably for a child who has never used any gun, let alone a Beretta 92FS – that after removing the magazine, the gun was unloaded. However, unbeknownst to Billy, due to the design of the Beretta 92FS, a bullet remained in the gun's chamber even after he removed the magazine.[4] Believing the gun to be unloaded, Billy aimed the gun at Josh and, pretending to shoot Josh, pulled the trigger. In doing so, Billy killed Josh, inflicting a fatal gunshot wound to his stomach. Upon realizing that the gun had gone off and wounded his friend, Billy immediately called 911 and reported that he had found a gun and accidentally shot his friend while playing with it.

Petitioners, the representatives of Josh's estate, sued Beretta in Illinois state court on several state

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[4] In general, handguns may be divided into two major categories: (1) revolvers, and (2) semi-automatic pistols. Jon S. Vernick et al., *"I Didn't Know the Gun Was Loaded": An Examination of Two Safety Devices that Can Reduce the Risk of Unintentional Firearm Injuries*, 20 J. Pub. Health Pol'y 427, 428 (1999) [hereinafter *Gun Was Loaded*]. A revolver holds ammunition in a rotating cylinder, while a pistol holds ammunition in a magazine containing ammunition cartridges. *Id.* When all of the ammunition cartridges are removed from the cylinder of a revolver, the gun is unloaded. *Id.* With a pistol, however, even if the magazine is removed, one cartridge may remain in the firing chamber, such that the gun may still be discharged. *Id.*

law theories of liability, including design defect, failure to warn, and breach of the implied warranty of merchantability. Although the trial court granted summary judgment in favor of Beretta on all of the estate's claims, the intermediate appellate court held that summary judgment was improperly entered in favor of Beretta on Petitioners' failure to warn claim. The intermediate appellate court held that the Protection of Lawful Commerce in Arms Act ("PLCAA" or "Act"), which had become law on October 26, 2005, barred the lawsuit against Beretta unless the remaining failure to warn claim fit within one of the PLCAA's exceptions, and remanded this issue to the lower court.

The PLCAA provides that a "qualified civil liability action" may not be brought in any state or federal court. 15 U.S.C. § 7902(a). The Act provides further that any qualified civil liability action pending as of October 26, 2005 "shall be immediately dismissed by the court in which the action was brought or is currently pending." *Id.* § 7902(b). A "qualified civil liability action" is defined in the PLCAA as "a civil action ... against a manufacturer or seller of [firearms or ammunition] ... for damages ... or other relief, resulting from the criminal or unlawful misuse of a [firearm]." *Id.* § 7903(5)(A). However, certain actions are expressly excluded from the definition of "qualified civil liability action," including actions for "death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner...." *Id.* § 7903(5)(A)(v) (hereinafter the "Defect Exception"). Such actions falling under this exception

are nonetheless deemed "qualified civil liability action[s]" where "the discharge of the product was caused by a volitional act that constituted a criminal offense." *Id.*

On appeal of the intermediate appellate court's decision, the Illinois Supreme Court held that the PLCAA required dismissal of Petitioners' case. *See Adames* v. *Sheahan*, 909 N.E.2d 742 (Ill. 2009). The Illinois Supreme Court determined that the action resulted from the "criminal or unlawful misuse" of a handgun because Billy was adjudicated delinquent in juvenile proceedings for involuntary manslaughter and reckless discharge of a firearm. *Id.* at 759. The Illinois Supreme Court further held that, in light of both this adjudication and the fact that Billy "did choose and determine to point the Beretta at Josh and did choose and determine to pull the trigger," the Defect Exception did not apply because the discharge of the handgun "was caused by a volitional act that constituted a criminal offense." *Id.* at 763.

SUMMARY OF ARGUMENT

Thousands of children are killed by guns each year. Thousands more suffer tragic gun-related injuries. Many of these deaths and injuries could be avoided if gun manufacturers incorporated simple and inexpensive gun safety mechanisms into their firearms. Moreover, the threat of meritorious products liability litigation provides an effective incentive for firearm manufacturers to take the steps necessary to ensure that their products are safe.

In enacting the PLCAA, Congress recognized the importance of this incentive by excluding from the

immunity granted to firearm manufacturers those cases where defective firearms cause death or bodily injury. Specifically, Congress enacted the PLCAA to shield firearm manufacturers only from liability for the *criminal* misuse of firearms. The Illinois Supreme Court's decision in this case, however, incorrectly reads the PLCAA as shielding Beretta from liability for the death of a boy at the hands of an unwitting child using a defectively designed gun. Allowing the Illinois Supreme Court's decision to stand would foreclose meritorious lawsuits against gun makers for the accidental killings of children and teens caused by defective firearms. As a result, firearm manufacturers like Beretta may "cut corners" on safety measures that could prevent thousands of deaths and injuries each year.

Nothing in the statute compelled the lower court's decision. The PLCAA does not preempt actions "resulting directly from a defect in design" except in cases involving "a volitional act that constituted a criminal offense." 15 U.S.C. §7903(5)(A)(v). Contrary to the court's reading of the statute, an accidental shooting of the sort that occurred in this case is not reasonably termed a "volitional act." Nor is it reasonably termed a "criminal offense" when juvenile proceedings are considered *civil* in nature.

This Court should grant the petition for certiorari because the Illinois Supreme Court has "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Indeed, this case raises issues of the utmost importance, including the impact of firearms on children's physical and mental health and the cost to

the public health system in the United States. The thousands of children and teens killed or injured each year from firearms deserve this Court's attention.

ARGUMENT

The decision of the Illinois Supreme Court in this case presents an issue of national importance. First, it raises questions concerning the death or injury of children, our most precious national resource. Second, more than 20,000 children and teens were killed or injured by firearms in 2006 alone. This is a staggering number, and it is a number that may very well increase unless the decision below is reversed. Even at current or reduced levels, the number of children killed or injured by firearms in this country is unacceptable. The decision of the Illinois Supreme Court, if allowed to stand, will effectively immunize firearm manufacturers from lawsuits arising from accidental shootings of children caused by defects in their products, and thus remove a powerful incentive for such manufacturers not to cut corners when it comes to the safety of their guns. The interests of children call for nothing less.

I. Handguns – and Particularly Defective Handguns – Pose a Unique Danger to Children.

Young people are killed or injured by gunfire at an average rate of one every two hours and 45 minutes. *Protect Children, Not Guns*, at 2. In 2006, the 3,184 children and teens killed by gunfire in the United States would fill more than 127 public school classrooms of 25 students each. Of these victims,

2,225 were murdered, 763 committed suicide, and 196 died in accidental or undetermined circumstances. Sixty-three preschoolers were killed by firearms in 2006, compared to 48 law enforcement officers killed in the line of duty. Further, thousands more children and teens are injured each year by gunfire. For every unintentional firearm fatality, there are an estimated 13 additional victims injured seriously enough to be treated in hospital emergency rooms. Joseph L. Annest et al., *National Estimates of Nonfatal Firearm-Related Injuries: Beyond the Tip of the Iceberg*, 273 J. Am. Med. Assoc. 1749, 1751 (1995). Many of these deaths and injuries, including those resulting from intentional shootings, could be prevented by simple design changes making it more difficult for children to use guns. The State of Illinois, which would be governed by the *Adames* decision should this Court allow the decision below to stand, sits near the top of these statistics, ranking fifth among states in the total number of children killed by firearms in 2006, and sixth in the total number accidentally killed by firearms that year. *See Protect Children, Not Guns*, at 6-7.

Moreover, many of these deaths and injuries by guns could have been avoided if the guns used had simple gun safety mechanisms. Nearly one-third of all unintended shootings are the result of design defects. Richard B. Ismach et al., *Unintended Shootings in a Large Metropolitan Area: An Incident-Based Analysis*, 41 Annals Emergency Med. 10, 13 (2003); *see also* U.S. Gen. Accounting Office, GAO/PEMD-91-9, *Accidental Shootings: Many Death and Injuries Caused by Firearms Could be Prevented*, at 2 (Mar. 1991) (estimating that "31% of accidental

deaths caused by firearms might be prevented by the addition of two safety devices").

For example, a 2003 study of 263 types of pistols made in the United States revealed that the vast majority of them failed to incorporate simple safety devices. John S. Milne et al., *Effect of Current Federal Regulations on Handgun Safety Features*, 41 Annals Emergency Med. 1, 5-6 (2003); *see also* Anil Ananthaswamy, *The Way of the Gun*, New Scientist, at 9 (July 12, 2003) (explaining the types of technological safeguards that could be incorporated into handguns). This study found that only 13% had a loaded chamber indicator, which indicates to the user that the gun's firing chamber has ammunition. Only 20% had a grip safety, which makes it harder for children to fire a gun. Only 21% had a magazine safety, which stops a pistol from firing once the magazine has been removed, even if a round remains in the chamber. A 1999 study is consistent with these results: out of 257 different pistol models, only 11% had a loaded chamber indicator and only 14% had a magazine safety. *Gun Was Loaded*, *supra* note 4, at 433-34.

II. Products Liability Lawsuits Against Firearm Manufacturers Can Lead to Safer Products.

The tragic – and avoidable – consequences posed by poorly designed or manufactured firearms as described above makes creating incentives for firearm manufacturers to ensure the safety of their firearms of paramount national importance. In this regard, meritorious products liability lawsuits against firearm manufacturers offer an effective

means of such deterrence, and can lead – and in some cases have led – to significant improvements in product safety.

Generally speaking, products liability litigation "can serve as a powerful tool for prevention" by transferring the cost of injuries "from the damaged person to the person or corporation who could have but did not prevent the injury...." Jon S. Vernick et al., *Role of Litigation in Preventing Product-Related Injuries*, 25 Epidemiologic Rev. 90 (2003) [hereinafter *Role of Litigation*].

This Court has repeatedly recognized the utility of state tort actions in creating an economic incentive for manufacturers to make safer products. *See, e.g.*, *Saratoga Fishing Co.* v. *J.M. Martinac & Co.*, 520 U.S. 875, 881 (1997) ("One important purpose of defective-product tort law is to encourage the manufacture of safer products. The various tort rules that determine which foreseeable losses are recoverable aim, in part, to provide appropriate safe-product incentives."); *accord Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449-50 (2005) (noting that "[t]he long history of tort litigation against manufacturers of poisonous substances ... emphasizes the importance of providing an incentive to manufacturers to use the utmost care in the business of distributing inherently dangerous items"); *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1202 (2009) (observing that in the context of the pharmaceutical industry, "[s]tate tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly"). Empirical evidence also suggests that potential

liability influences manufacturers' product design and warning decisions, creating an incentive for them to create safer products. *Role of Litigation*, *supra*, at 91 (citing various studies on the impact of product liability law on corporate behavior and decision making).

A prime example of the impact that product liability lawsuits can have on product safety can be found in litigation against automobile manufacturers. After all, it was out of a private state-law products liability action that the "crashworthiness doctrine," which required automobile manufacturers to make vehicles reasonably crashworthy due to the foreseeability of collisions, was born. *Larsen* v. *Gen. Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). As a result of this doctrine, automobile manufacturers universally improved the safety of their vehicles. *See* Jon S. Vernick et al., *Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines, and Motor Vehicles*, 97 Am. J. Pub. Health 1991, 1995 (2007). Similarly, Ford Motor Company famously recalled its Pinto and changed its design after a Pinto passenger suffered disfiguring burns from a post-collision fire and sued Ford for damages relating to his injury. *See Grimshaw* v. *Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981).

Like automobile manufacturers, firearm manufacturers also appear to respond in significant ways to product liability litigation by improving product safety. For example, in 2000, Smith & Wesson, the Nation's largest handgun manufacturer, agreed to implement enhanced gun safety technology

and improve its monitoring of distributors and dealers to settle 15 lawsuits brought by municipalities. The gun maker agreed, among other reforms, to imprint a second, hidden serial number on its handguns, to put trigger locks on all of its handguns, to make its handgun grips bigger and its triggers more difficult to pull to reduce the ability of young children to fire the gun, and to implement "smart" gun technology to allow handguns to be fired only by authorized users. James Dao, *Under Legal Siege, Gun Maker Agrees to Accept Curbs*, N.Y. Times, Mar. 18, 2000; *see also* Rachana Bhowmik, *Aiming for Accountability: How City Lawsuits Can Help Reform an Irresponsible Gun Industry*, 11 J.L. & Pol'y 67, 129 (2002); Ryan VanGrack, *Recent Development: The Protection of Lawful Commerce in Arms Act*, 41 Harv. J. on Legis. 541, 553-54 (2004). Meritorious product liability litigation can and does play a critical role in incentivizing improvements in product safety in the firearms industry, and in keeping the firearm-equivalent of the "Pinto" from being used by children.

III. The Illinois Supreme Court's Interpretation of the Defect Exception Improperly Immunizes Gun Makers in Cases Where Their Defective Guns Lead to Accidental Shootings by Children.

A. The Legislative History of the Act Confirms That It Was Intended To Foreclose Actions Against Gun Makers Arising From Criminal Misuse of a Firearm, Not From the Accidental Use of a Defective Firearm.

Lawsuits against gun manufacturers for accidental death or injury due to a defective gun have been brought under various state law theories of liability, including design defect, negligent design, failure to warn, and breach of the implied warranty of merchantability. The PLCAA was not intended to prevent such lawsuits. And the PLCAA was expressly not intended to prevent such lawsuits by child victims of gun violence.

Rather, Congress passed the PLCAA for the more limited purpose of ensuring that firearm manufacturers would not be held responsible for *criminal* misuse of firearms. As the Report of the House Judiciary Committee stated, "[i]f a company manufactures a legitimate product that is widely and lawfully distributed, and the product is criminally or unlawfully misused to injure a person, and the product is functioning properly, *without any defect in its design or manufacture*, a manufacturer should not be held liable for that injury." *Protection of Lawful*

Commerce in Arms Act Report, H.R. Rep. No. 109-124 (2005), at 23 (emphasis added).

This statement of intent carries significant interpretive weight, because, as this Court has recognized, "'the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which "represent the considered and collective understanding of those [members of Congress] involved in drafting and studying proposed legislation."'" *Eldred* v. *Ashcroft*, 537 U.S. 186, 210 n.16 (2003) (quoting *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969))). Further, as the Act itself indicates, one of the main purposes of the PLCAA is "[t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm *solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended*." 15 U.S.C. § 7901(b)(1) (emphasis added).

Statements by sponsors of the PLCAA also demonstrate that the Act was not intended to foreclose actions against gun manufacturers for accidental injuries or death resulting from the use of their defective products. As one of the sponsors of the PLCAA stated on the Senate floor:

> What this bill does not do is as important as what it does do. This is not a gun industry immunity bill.... This bill does not create a legal shield for anybody who manufactures or sells a

> firearm. It does not protect members of the gun industry from every lawsuit or legal action that could be filed against them. *It does not prevent them from being sued for their own misconduct. This bill only stops one extremely narrow category of lawsuits, lawsuits that attempt to force the gun industry to pay for the crimes of third parties over whom they have no control.* We have tried to make that limitation as clear as we possibly can and in several ways....

151 Cong. Rec. S9059, 9088 (daily ed. July 27, 2005) (statement of Sen. Craig) (emphasis added). Similarly, Senator John Thune of South Dakota, a co-sponsor of the bill, commented that "[t]he bill allows suits against manufacturers who breach a contract or a warranty, for negligent entrustment of a firearm, for violating a law in the production or sale of a firearm, or for harm caused by a defect in design or manufacture." 151 Cong. Rec. S9374, S9378 (daily ed. July 29, 2005) (statement of Sen. Thune).

Other Senators echoed Senators Craig and Thune in their descriptions of the purpose of the Act. *See, e.g.*, 151 Cong. Rec. S9374, S9389 (daily ed. July 29, 2005) (statement of Sen. Allen) ("This legislation does carefully preserve the right of individuals to have their day in court with civil liability actions for injury or danger caused by negligence on [sic] the firearms dealer or manufacturer or defective product, a standard in product liability law."); 151 Cong. Rec. S9217, S9226 (daily ed. July 28, 2005) (statement of

Sen. Graham) (noting that the bill "doesn't relieve you of duties that the law imposes upon you to safely manufacture and to carefully sell," but does not extend "to a concept where you are responsible, after you have done everything right, for what somebody else may do who bought your product").

In furtherance of this legislative intent, Congress enacted the Defect Exception as one of several exceptions to the type of action that must be dismissed. The Defect Exception excludes from mandatory dismissal actions "for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner." 15 U.S.C. § 7903(5)(A)(v). And, to give effect to Congress's intent to protect firearm manufacturers only from lawsuits arising from criminal misuse of non-defective firearms, the Defect Exception itself contains an exception "where the discharge of the product was caused by a volitional act that constituted a criminal offense." *Id.*

Congress expressly intended to permit suits by child victims, even those victimized by children breaking the law. *See* 151 Cong. Rec. S9059, S9100 (daily ed. July 27, 2005) (statement of Sen. Craig) ("Language was added to this section of the bill to make clear that even if the person who discharged a defective product was technically in violation of some law relating to possession of the product, that alone would not bar the lawsuit."). For emphasis, Senator Craig, a sponsor of the PLCAA, provided an example: "[I]f a juvenile were target shooting without written permission from his parents-that is a violation of

current law ... -and was injured by defective ammunition, the juvenile would still be able to bring a suit against the ammunition manufacturer." *Id.*

In subsequently arguing (successfully) against the adoption of an amendment that would have expressly exempted actions brought by child victims from the Act's liability shield, Senator Craig again explained that such an amendment was unnecessary *because such actions were already exempted under the Act. See* 151 Cong. Rec. S9374, S9377 (daily ed. July 29, 2005) (statement of Sen. Craig) ("[I]f a child is injured by some wrongdoing of the gun industry, the lawsuits are not barred."). Senator Craig clarified that "[c]hildren are as protected under this proposed law as anyone else because this law says go after the criminal, don't go after the law-abiding gun manufacturer or the law-abiding gun seller." *Id.* As these remarks indicate, Congress intended only that gun manufacturers avoid liability for the acts of criminals. Congress did not intend to immunize gun manufacturers from their own wrongdoing.

Although some opponents of the PLCAA argued that the PLCAA "close[d] the courthouse doors to gun victims,"[5] this Court has recognized that "'[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.'" *Bryan* v. *United States*, 524 U.S. 184,

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[5] *See* 151 Cong. Rec. H8990, H9007 (daily ed. Oct. 20, 2005) (statement of Rep. Stark) ("As soon as the President signs this bill into law, Americans will be able to sue the manufacturer of any product except for guns for death, injury, and any other kind of negligence. Congress, at the behest of the NRA, will close the courthouse doors to gun victims.").

196 (1998) (quoting *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951)). Rather, "[i]t is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros.*, 341 U.S. at 394-95. Statements by the PLCAA's sponsors, as well as the House Judiciary Committee Report, indicate that the Act was intended to protect firearm manufacturers only from lawsuits arising from the criminal acts of others, and not from any and all actions against gun manufacturers, particularly those arising from an accidental shooting by a child. As Senator Baucus, a co-sponsor of the bill that became the PLCAA, also explained: "This bill will not close the courthouse doors to legitimate suits against the firearms industry. It will not shield the industry from its own wrongdoing or from its negligence or if the industry puts out a bad product." 151 Cong. Rec. S9059, S9107 (daily ed. July 27, 2005) (statement of Sen. Baucus).

B. The Act of Billy Swan Cannot Reasonably Be Construed As a "Volitional Act That Constitutes a Criminal Offense."

This lawsuit is not an attempt to fix the blame of a third party's misdeeds on the manufacturer of a firearm. When Billy Swan pulled the trigger of the Beretta 92FS, he did not expect the gun to fire. Pet. App. 4a. Billy had removed the magazine from the gun and thought that the gun could not be fired if the magazine was removed.

Empirical data suggests that Billy's expectation was a reasonable one. In a poll conducted for The

Johns Hopkins Center for Gun Policy and Research, a representative sample of the U.S. adult population was asked whether a gun could be fired if the magazine was removed; over one-third of those surveyed either thought the gun could not be fired or did not know whether the gun could be fired. Of these, approximately one-fourth had a gun in their homes. *Gun Was Loaded*, *supra* note 4, at 430. Children, who are much less likely to be educated about the intricacies of gun design, may be even more likely to be unaware that a gun can fire even after the magazine is removed.

The Illinois Supreme Court's holding that the PLCAA requires dismissal of this case because the shooting of Josh Adames was a "volitional act that constituted a criminal offense" defies the common-sense conclusion that Billy killed Josh by accident. The record in this case amply supports the conclusion that Billy's conduct was accidental, not a "volitional act that constituted a criminal offense." As the Illinois Supreme Court itself recognized, Billy "thought [the gun] was unloaded when the magazine was taken out. He thought that the bullet came out of the top of the magazine when the handgun was fired, and did not know that a bullet remained in the chamber." Pet. App. 4a.

Despite this fact, the court below found Billy's act to be volitional because he "did choose and determine to point the Beretta at Josh and did choose and determine to pull the trigger." *Id.* at 42a. This overly expansive interpretation of the term "volitional act," however, cannot be squared with the limits Congress intended to impose on the type of lawsuits from

which firearm manufacturers would be shielded under the Act. Although the Illinois Supreme Court looked to definitions of "volition" in both Black's Law Dictionary and Webster's Third New International Dictionary, *see id.*, these definitions reveal nothing about which "act" must be volitional under Section 7903(5)(A)(v). While the court below viewed the relevant "act" as the act of Billy pointing the gun at Josh and pulling the trigger, it could have just as easily viewed the relevant "act" as Billy's shooting of a *loaded* gun at Josh, which the record clearly demonstrates was not an act of choice. *See* Pet. App. 3a-5a.

The Illinois Supreme Court's view of "volitional act" as simply Billy's pulling of the trigger, regardless of his belief that the gun was not loaded, leads to a result wholly at odds with the intent of Congress. Billy's shooting of Josh was clearly accidental. The Illinois Supreme Court's reading of the term "volitional act" also runs counter to the well-established rule of statutory construction that "'in all cases of statutory construction, [the Court's] task is to interpret the words of the statute in light of the purposes Congress sought to serve.'" *Norfolk Redev. & Hous. Auth.* v. *Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 36 (1983) (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979)). Under the Illinois Supreme Court's reading of "volitional act," a child's intentional throwing of a loaded, defective handgun to the ground, thereby accidentally setting off a gunshot that kills or injures another, would be considered a "volitional act" shielding the gun manufacturer from liability. Taken to its logical extreme, this reading of the term

"volitional act" renders the Defect Exception meaningless.

The Illinois Supreme Court also wrongly concluded that the accidental discharge constituted a "criminal or unlawful misuse" under Section 7903(5) (and a "criminal offense" under Section 7903(5)(A)(v)) because Billy Swan was found delinquent in juvenile court proceedings. Under Illinois law, delinquency proceedings are civil, not criminal, in nature. *In re Rodney H.*, 861 N.E.2d 623, 630 (Ill. 2006) ("proceedings under the Act still are not criminal in nature"). "Delinquency proceedings are ... protective in nature and the purpose of the [Juvenile Court] Act is to correct and rehabilitate, not to punish." *In re W.C.*, 657 N.E.2d 908, 916 (Ill. 1995); *see also In re Armour*, 319 N.E.2d 496, 498 (Ill. 1974) ("The first purpose of [a juvenile court] statute is not to punish but to correct"). Indeed, "no suggestion or taint of criminality attaches to any finding of delinquency by a juvenile court." *In re Dow*, 393 N.E.2d 1346, 1349 (Ill. App. Ct. 1979) (citing *People ex rel. Hanrahan v. Felt*, 269 N.E.2d 1, 3 (Ill. 1971); *accord People v. Brazee*, 775 N.E.2d 652, 656 (Ill. App. Ct. 2002).

Subject to certain limited exceptions not applicable here, "no minor who was under 17 years of age at the time of the alleged offense may be prosecuted under the criminal laws of this State." 705 Ill. Comp. Stat. 405/5-120 (2009) (eff. until Jan. 1, 2010); *see also* 705 Ill. Comp. Stat. 405/5-130 (2009) ("The definition of delinquent minor under Section 5-120 of this Article shall not apply to any minor who at the time of an offense was at least 15 years of age and who is charged with: (i) first degree

murder, (ii) aggravated criminal sexual assault.... These charges and all other charges arising out of the same incident shall be prosecuted under the criminal laws of this State."); *id.* 405/5-805 (describing conditions for the prosecution of a juvenile under Illinois criminal law upon the State's motion).

Illinois is not unusual. Juvenile offenders do not commit "crimes" under most state laws. *See, e.g.*, Preston Elrod & R. Scott Ryder, *Juvenile Justice: A Social, Historical, and Legal Perspective* 4 (2005). As this Court has recognized, the purpose of the juvenile adjudication system generally is to rehabilitate the child, not to punish crimes. *See In re Gault*, 387 U.S. 1, 15-16 (1967) (describing the history of the juvenile justice system) ("The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.").

Billy was not prosecuted under Illinois criminal laws, nor can his adjudication as delinquent be considered a determination that he engaged in a "criminal" act. Equating a juvenile delinquency adjudication to a "crime" for which the sponsors of the PLCAA did not intend for gun manufacturers to be punished ignores both the purposes of the juvenile justice system and the intentions of the sponsors of the PLCAA. The Illinois Supreme Court's faulty assumption that a juvenile delinquency adjudication is tantamount to a "criminal offense" leads to a result that is contrary to the PLCAA and, ultimately, to the interests of our Nation's children.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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